



State of Rhode Island and Providence Plantations
RHODE ISLAND BOARD OF EDUCATION

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Enclosure 6a
January 28, 2020

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January 28, 2020

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TO: Members of the Council on Elementary and Secondary Education

FROM: Amy Beretta, Appeals Committee Chair

**RE: L. Doe, S. Doe, and A. Doe, on behalf of their children,
X. Doe, Y. Doe, and Z. Doe, and on behalf of a class of
similarly situated children in the Providence School
District**

The Appeals Committee of the Council on Elementary and
Secondary Education met on December 3, 2019, to hear oral
argument on the appeal of the following Commissioner decision:

**L. Doe, S. Doe, and A. Doe, on behalf of their children X. Doe, Y. Doe, and
Z. Doe, and on behalf of a class of similarly situated children in the
Providence School District**

**RECOMMENDATION: THAT, in the matter of L. Doe, S. Doe, and
A. Doe, on behalf of their children X. Doe, Y. Doe, and Z. Doe, and
on behalf of a class of similarly situated children in the Providence
School District, the Commissioner's Decision is affirmed, as
presented.**

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STATE OF RHODE ISLAND

**COUNCIL ON ELEMENTARY
AND SECONDARY EDUCATION**

L DOE, S DOE, AND A DOE	:
on behalf of their children X DOE, Y DOE,	:
and Z DOE, and on behalf of a class of similarly	:
situated children in the Providence School	:
district	:
	:
vs.	:
	:
PROVIDENCE	:
SCHOOL DISTRICT	:

DECISION

This is an appeal by L Doe, S Doe, and A Doe, parents of students who are English Language Learners (“Appellants”), from the decision of the Commissioner of Education (“Commissioner”) dated March 8, 2019, concluding that the Providence School District (“Providence”) Collaboration/Consultation Model for English Language Learner services does not violate the Rhode Island Regulations Governing the Education of English Language Learners. The March 8, 2019 decision of the Commissioner (the “Decision”) also found Providence in violation of certain reporting requirements, a determination which Providence did not appeal. Accordingly, only the aspect of the Decision related to Appellants’ appeal will be discussed.

The pertinent facts were stipulated by the parties and outlined in the Decision as follows. Appellants’ children were enrolled in Providence and identified as children with disabilities under the Individuals with Disabilities Education Act. Appellants’ children have individualized education programs and receive special education services. Additionally, they qualify as English

Language Learners (“ELLs”). Providence uses a “Collaboration/Consultation Model” to deliver ELL services. The Collaboration/Consultation Model bases the amount of direct English Language Development instruction a student receives from an ELL-endorsed or certified teacher (an “ELL Teacher” as defined by the Regulations) to the World-Class Instructional Design and Assessment Literacy Proficiency level of the student. General education students with proficiency levels between 1.0 and 2.9 received between 30 and 60 minutes of direct instruction daily from an ELL-endorsed or certified teacher. There is no requirement for direct instruction time by an ELL-endorsed or certified teacher for a student with a proficiency level of 2.9 and above. However, an ELL-certified or endorsed teacher must consult and collaborate with the non-ELL teachers providing ELL services. Such consultations must take place at least every eight (8) weeks, but there is no minimum time per consultation required. The Providence “English Language Learner Handbook: A Resource for Providence Educators” outlined the requirement for consultation and collaboration, including the ELL-endorsed or certified teacher reviewing the student’s data during each consultation, and making such modifications or accommodations as necessary to best meet the student’s language development needs.

The parties filed cross-motions for summary judgment. Appellants argued that Providence was violating the Rhode Island Regulations Governing the Education of English Language Learners (the “Regulations”) by (1) failing to provide direct ELL instruction from an ELL-endorsed or certified teacher, and (2) not complying with minimum hours of direct ELL instruction from an ELL-endorsed or certified teacher, and (3) not complying with the models of instruction permitted. In its competing request for summary judgment, Providence argued that the Regulations expressly permit Providence to create its own model that utilizes different

components of the models listed. Further, Providence contended that the Regulations do not require direct ELL instruction from an ELL-endorsed or certified teacher at all times.

After submission of the summary judgment motions, but prior to issuance of a decision, Appellants moved to reopen the hearing to include a settlement agreement between the United States Department of Justice and Providence regarding the Providence ELL program. Providence objected and asked the hearing officer to recuse, believing the settlement agreement could prejudice the hearing officer in the matter. On September 21, 2018, the hearing officer ruled that the settlement agreement with the federal government is not relevant to its claims based on state law and denied the motion. Additionally, the hearing officer noted that the settlement agreement itself and references thereto were avoided by the hearing officer, and the motion to recuse was also denied.

In the Decision, the Commissioner determined that the Regulations do not support Appellants claim that all ELL instruction must be delivered by an ELL-endorsed or certified teacher. Therefore, the minimum hours of ELL instruction may be satisfied by non-ELL-endorsed or certified teachers providing instruction through the school day using the language accommodations and instructional approaches provided by the ELL-endorsed or certified consulting teachers. Lastly, the Commissioner found that the Providence model appropriately contains components from approved models found in the Regulations.

Appellants filed a timely appeal of the Decision repeating the same three (3) grounds outlined above which were presented to the hearing officer, and also asking that the Rhode Island Council on Elementary and Secondary Education (the “Council”) find error in the failure to reopen the hearing and consider the settlement agreement as evidence that the Providence model violates federal law, and therefore must be found to violate the Regulations. Ultimately,

Appellants ask the Council to reverse the Commissioner, find that the Providence model violates the Regulations as a matter of law, and remand to the hearing officer for computation of damages owed to students. In a point by point response, Providence likewise reiterates its arguments before the hearing officer concluding that the Providence model is in compliance with the Regulations. Further, Providence objected to references and citations to the settlement agreement as proof that the Providence model violated any law. Providence argues that settlement agreements, especially those in which no liability is admitted, are inadmissible.

The Council has reviewed the records, the briefs filed by the parties, and considered the arguments presented at oral argument. We note the standard of review for the Council, which is limited to a determination regarding whether the Commissioner's decision is "patently arbitrary, discriminatory, or unfair." Altman v. School Committee of the Town of Scituate, 115 (R.I.) 399, 405 (1975).

The Commissioner performed a detailed analysis of the Regulations when evaluating the allegations that Providence is in violation due to its ELL model. First, to determine whether the Regulations require direct instruction from an ELL Teacher, and whether the minimum hours' requirements can only be met by direct instruction from an ELL Teacher, the Decision outlined the definitions provided in the Regulations. Section L-4-2(11) of the Regulations defines an ELL Teacher as a teacher that has an ELL endorsement or certification. Further, Section L-4-2(17-26) of the Regulations defines the methods of instruction and assessment. The Decision cited numerous ELL instruction methods that include a requirement for teachers to obtain an endorsement or certification to provide ELL instruction including the English as a Second Language method, the Collaborative ESL Instruction method, the Bilingual Education method, and others. *Commissioner's Decision dated March 8, 2019, at pp. 5-6.* Additionally, other

methods of instruction do not include the requirement that teachers be ELL endorsed or certified, such as the Sheltered Content model, which only requires that teachers “participate in specialized ESL training.” *Id.* at 6. Notably absent from the definitions of various methods of instruction and assessment is the term “ELL Teacher.” Further, the only reference to an ELL Teacher outside of the definitions section of the Regulations is found in Section L-4-11(b), which requires school districts to “employ a sufficient number of ELL teachers to ensure that ELL students receive the instruction and the support required by these regulations.” As noted in the briefs of both parties, we must begin with the plain language of the Regulations. Reynolds v. Jamestown, 45 A.3d 537, 541 (2012) (*see, also, Appellants Brief dated April 10, 2019, at pp. 6-7, and Providence Brief dated July 22, 2019, at p. 10*). Here, the plain language of the Regulations does not include any requirement that all ELL instruction be performed directly by an ELL Teacher. In fact, the definition of the Sheltered Content Instruction method explicitly authorizes instruction from a non-ELL Teacher (subject to appropriate specialized training which was not put at issue in this matter). Regulations §L-4-2(21). We find no error in the Commissioner’s determination that not all ELL instruction must be done directly by an ELL Teacher under the Regulations.

Appellants also ask us to consider whether special education students that may receive less direct ELL instruction from an ELL Teacher is discriminatory under the Section L-4-5(7) of the Regulations, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. However, Appellants do not expound any further regarding the nature of the violation under these federal statutes. As noted above, there is no requirement under the Regulations that ELL instruction be performed by an ELL Teacher. Appellants present no evidence that special education students receive less ELL instruction than a general education student and, therefore, we do not find grounds for reversal on this basis.

Similar to Appellants argument that ELL instruction must generally be performed by an ELL Teacher, we move to the minimum hours violation allegation. Section L-4-7 of the Regulations contain no requirement that ELL instruction be provided by an ELL Teacher at all times, but rather only reference the amount of ELL instruction time a student must receive. Once again, we agree with the Commissioner that the plain meaning of the Regulations does not support Appellants contention that all ELL instruction must be performed by an ELL Teacher, including the instruction time to meet the minimum hours in Section L-4-7 of the Regulations.

The last claim of error Appellant raises within the Decision is that the Providence model is not consistent with the approved models of instruction found in the Regulations. Section L-4-10 of the Regulations states that “[d]istricts may choose one or more of the following models, or components from these models, as defined in these regulations in section L-4-2 . . . “ The Commissioner found “sufficient evidence to show that the Providence model contains components from the approved models listed in §L-4-10.” *Commissioner’s Decision dated March 8, 2019, at p. 8*. Again, we find no grounds for reversal in this finding. The Regulations explicitly allow school districts to use “components from the approved models.” Regulations §L-4-10. The Commissioner further cited specific components used in the Providence model that are authorized by the Regulations. *Commissioner’s Decision dated March 8, 2019, at p. 8*

Next, we turn to the Appellants request to find error in refusing to reopen the hearing and admit the settlement agreement between the United States Department of Justice and Providence. First, we note that the hearing officer found that a settlement agreement with the federal government had no bearing on the Appellants allegation of a violation of the Regulations. On appeal, we are asked to reverse this Decision and find that the settlement agreement should be admitted as proof of a violation of federal law that would therefore invalidate the Regulations as

interpreted by the Commissioner. Notably, outside of references to the settlement agreement, Appellants do not cite any specific requirements of any federal law, nor any cases evaluating federal law, that support the contention that all ELL instruction must be provided by an ELL Teacher, or that the Providence model violates such a federal law. Appellants had the opportunity to present those claims before the hearing officer and raise them on appeal. Instead, we are asked to find error in failure to reopen the hearing while the Decision was pending and consider a settlement agreement entered into by one party with the federal government as proof of a violation of the Regulations. We decline, as we find no error in the refusal to reopen the hearing during the pendency of the Decision to consider the settlement agreement.

Having considered all the arguments presented by Appellants, we find no error in the Commissioner's decision that rises to the level for the Council to reverse the decision and remand for a calculation of damages. No part of the Commissioner's decision is "patently arbitrary, discriminatory, or unfair", the standard of review in appeals to the Council. Altman v. School Committee of the Town of Scituate, 115 (R.I.) 399, 405 (1975). This decision is limited to the grounds presented in this matter, whether the Regulations require every minute of ELL instruction be performed by a teacher with an ELL endorsement, and whether the Providence model developed from the different components of the methods of instruction listed violates the Regulations. Nothing in this decision should be construed to limit the Commissioner, or the Council on appeal, from finding that a school district's ELL program violates specific provisions of the Regulations on a case-by-case basis, including but not limited to the requirement that "[s]chool districts shall employ a sufficient number of ELL teachers to ensure that ELL students receive the instruction and support required by the regulations" in §L-4-11(b).

For the reasons stated herein, the decision of the Commissioner is affirmed.

The above is the decision recommended by the Appeals Committee after due consideration of the record, memoranda filed on behalf of the parties and oral arguments made at the hearing of the appeal on December 3, 2019.

Council on Elementary and Secondary Education

Daniel McConaghy, Chair

_____, 2019

Amy Beretta, Appeals Committee Chair

_____, 2019